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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 875

In the Matter

of

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, A Corporation,

Petitioner,

vs.

CITY OF TUCSON, A Municipal Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENT

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March 17, 1946

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OPINIONS BELOW

No opinion was rendered by the United States District Court for the District of Arizona. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. Vol. II, p. 14) has not as yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Amended (28 U. S. Sec. 347). The order of the Circuit Court of Appeals sought to be reviewed was entered on December 26, 1945 (R. Vol. II, p. 24).

STATEMENT OF FACTS

Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment of the United States District Court for the District of Arizona dismissing its complaint in a condemnation proceeding. The complaint was dismissed on motion of the Petitioner on the ground that the complaint failed to state a claim upon which relief could be granted. (R. Vol. I, p. 43).

The complaint seeks a judgment of valuation of all the electric and gas plants and systems of the Petitioner, for the purpose of procuring a final order of condemnation vesting title of the property in the Respondent after revenue bonds for their acquisition have been issued and disposed of and the amount awarded is paid. (R. Vol. I, pp. 2-20).

The Circuit Court reversed the judgment of the District Court and the Petitioner now seeks a Writ of Certiorari to the Circuit Court. (R. Vol. II, p. 24; Petition pp. 1-7).

SUMMARY OF ARGUMENT

The petition for Writ of Certiorari, being based upon the ground that the decree of the Circuit Court of Appeals herein, is in conflict with applicable decisions of the Supreme Court of Arizona and the Supreme Court of the United States, should be denied in the absence of any showing of such conflict by Petitioner.

ARGUMENT

It should be noted that the Municipal Revenue Bond Act of 1943 is not a limitation nor a restriction upon the exercise of any power existing in a municipality, whether such power exists by virtue of the Constitution of Arizona, the general laws of the State, or the City Charter. It is a grant of additional power. A grant in addition to any power the municipalities may now have, by virtue of the Constitution of Arizona, any other laws of the State of Arizona, and the City Charter. (Petition and Brief of Petitioner, App. p. 22).

To hold that because a power now exists in a municipality by virtue of its Charter, the State cannot in addition thereto give or grant the same power to be exercised in another manner, is untenable and is and would be in conflict with the decisions of the Supreme Court of Arizona, for as said by that Court:

> "It is not a novelty in the law to find the same act punishable by statute and by City Ordinance. Indeed, it is quite common for the two jurisdictions to legislate concurrently on the same subject. Where the subject is one of local interest or concern, or where though not of local interest or concern the

> charter or legislation confers on the city express power to legislate thereon, both jurisdictions may legislate on the same subject."

Clayton v. *State,* 300 Pac. 1010; 38 Ariz. 466 at 468.

to the same effect see

State v. *Jaastad,* 32 Pac. (2d) 799; 43 Ariz. 458 at 463.

Humphrey v. *City of Phoenix,* 102 Pac. (2d) 82; 55 Ariz. 374 at 388.

It is therefore apparent that the decree of the Circuit Court of Appeals holding that the Respondent could proceed under the Municipal Revenue Bond Act of 1943 to acquire the properties of the Petitioner, is not in conflict with the decisions of the Supreme Court of Arizona.

It is next contended by Petitioner that the decree of the Circuit Court of Appeals violates the Constitution of Arizona providing that private property shall not be taken for private use, except for certain purposes not here involved.

(Petitioner's Br. p. 13)

This contention is also untenable for as stated by the Court in *City of Pasadena* v. *Railroad Com.,* 183 Cal. 526, 192 Pac. 25

> "It is not true that a City is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a City does not change its character by engaging in such enterprises."

The foregoing was quoted with approval by the Arizona Supreme Court in *Menderson* v. *City of Phoenix,* 51 Ariz. 280 at 289; 76 Pac. (2d) 321. See also *City of Phoenix v. Wright,* 52 Ariz. 227 at 233, points 3 and 4; 80 Pac. (2d) 390 at 392, 393, points 3 and 4.

It naturally follows, therefore, that a proprietary use is as much a public use as is a governmental function a public use. It is impossible for a municipal corporation to exercise a private use of anything. It may engage in an enterprise that is in the nature of a private enterprise but in so doing it is nevertheless a public corporation operating as such for the public of which it is comprised.

It is submitted that Petitioner has again failed to maintain its position that the decree of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Arizona for the reason that none of the decisions cited hold that a City, when carrying on a municipally owned public utility, is not a public corporation operating as such for the public of which it is comprised.

In support of its contention that the petition for Writ of Certiorari should be granted for the reason that the decree of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, petitioner contends that neither certainty of compensation nor any remedy for the enforcement of payment for the property is provided for. (Petitioner's Br., p. 15).

In each of the cases cited by Petitioner in support of such contention the statutes provided for the taking of the property but failed to provide a remedy for the enforcement of the payment and designating the persons who should pay. (Petitioner's Br., pp. 16, 17).

That is not the situation here for the reason that, as said by the Circuit Court of Appeals in its opinion (R. Vol. II, pp. 14-23 at 14-15)

> "Though the judgment assessing the value of the properties to be acquired is called a final judgment, condemnation—that is the vesting of title—is not made until the assessed amount it paid. Failure to pay the amount within the statutory time requires that the interlocutory order for condemnation be set aside and the entire proceedings annulled with a right of execution in the defendant. Id. Sec. 27-918. For properties to be paid for by revenue bonds, the time after judgment fixing the price within which the payment is made is eighteen months. Arizona Laws, 1933, Ch. 77, Sec. 3, p. 313."

From the foregoing the conclusion is inevitable that under the Municipal Revenue Bond Act of 1943, there can be no taking without just compensation being first paid the Petitioner and that therefore the decree of the Circuit Court of Appeals is not in conflict with any applicable decision of this Court.

The final contention of Petitioner is that because the damages and value are to be fixed as of the date of the issuance of the summons in the action and that no improvements placed upon the property thereafter shall be included in the assessment of damages and compensation the just compensation clause of the State Constitution and the due process clauses of the State and Federal Constitutions are violated. (Petitioner's Br. p. 17).

This contention is also untenable for many Courts have affirmed the fixing of the valuation as of the date of the summons and the precluding of compensation for additions, betterments and extensions put upon the property subsequent to the date of the service of summons.

Wiser Valley Land and Water Co. v. *Ryan,* 190 Fed. 417.

Brown v. *United States,* 263 U. S. 78; 44 Sup. Ct. 92 at 94, point 3; 68 L. Ed. 171.

Central Nebraska Public P. & Ir. Dist. v. *Fairchild,* 126 F (2d) 302.

City of Los Angeles v. *Goger,* 10 Cal. A. 378; 102 Pac. 17.

City of Oakland v. *Wheeler,* 34 Cal. A. 442; 168 Pac. 23.

Municipal Water Dist. v. *Marine Water and Power Co.* et al, 178 Cal. 308; 173 Pac. 469.

It may be that a public utility being operated for private profit should not be subject to any business hazards such as the right of a municipality to institute condemnation proceedings for the acquisition of its properties, but it is submitted that the right of condemnation is and has always been a perogative of the state and that in the instant case an exercise of that perogative with a requirment of just compensation being first made in the event of a taking is not a denial of due process but merely a hazard to be considered when private enterprize engages in business as a public utility.

CONCLUSION

The petitioner having failed to establish wherein the decree of the Circuit Court of Appeals reversing the judgment of the District Court dismissing the complaint for failure to state a claim upon which relief could be granted, is in conflict with any applicable decision of this Court, the Supreme Court of Arizona, or the United States or Arizona Constitutions, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

March 17, 1946.

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